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**DECISION**



**THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D.C. 20548**

**FILE: B-190238**

**DATE: March 23, 1978**

**MATTER OF: Documentation Associates**

**DIGEST:**

1. Protest that RFP for library services should not have been unrestricted and should have included library procedures manual, budget, and other data, filed after date for receipt of initial proposals, is untimely and will not be considered on merits. Even if request to contracting agency for data made prior to such date is considered protest, agency's receipt of initial offers without responding to request constitutes "initial adverse agency action" on protest; protest to GAO filed more than 10 working days thereafter is untimely.
2. Where record indicates source selection official initially considered costs of second high technical offeror so high as to be noncompetitive, offeror should not have been included in competitive range. Offeror was not, therefore, prejudiced by agency's failure to conduct cost discussions.

Request for proposals (RFP) No. 2-26383 for library technical processing services was issued on April 26, 1977, by the National Aeronautics and Space Administration (NASA). The solicitation contemplated a cost-plus-fixed-fee contract for a 2-year period, with an option for an additional year. Initial proposals were due on June 27.

The "Method of Evaluation" clause stated in part:

"Proposals will be evaluated in accordance with the requirements of NASA Procurement Regulation 3.804-2. Evaluation procedures, particularly those relating to conduct of written or oral discussions with offerors who submit proposals within a competitive range, are further defined by NASA Procurement Regulation

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Directive (PRD) No. 70-15 (Revised December 3, 1975), which is applicable to this procurement. It is particularly important that you recognize that the initial evaluation of your proposal and the initial determination of competitive range will be made upon a review of your written proposal only plus some investigations with regard to Cost, Experience and Past Performance and Other Factors.

" \* \* \* the [Evaluation] Committee will evaluate proposals with respect to four groups of factors as follows: Mission Suitability Factors, Cost Factors, Experience and Past Performance, and Other Factors. \* \* \*

The RFP established a numerical scoring system to define the relative merits of proposals. Of the factors listed in the Method of Evaluation clause, only the Mission Suitability Factors would be scored. In this connection clause VI.B, which defined "Cost Factors," provided in part:

"Cost Factors are not scored because the weight to be accorded to them can be judged by the Source Selection Official only after he has determined the relative merits of the proposal from a mission suitability standpoint and the significance of differences in this regard, and after he has adjudged the significance of Experience and Past Performance and Other Factors."

In addition, paragraph B of clause VII, "Weighting and Scoring," stated that once it is determined by evaluation of the Mission Suitability Factors that acceptance of the proposal "will achieve the desired result of getting the job done properly, the Cost Factors will become very important."

Three offers were received. On the basis of an initial evaluation Technology Development Corporation (TDC), which was the incumbent contractor, and Documentation Associates were determined to be within the

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competitive range. Discussions were then held with both firms, and revised offers were received. Further technical evaluation found that both submitted excellent proposals, with TDC's numerical score approximately 10 percent higher than Documentation Associates'. On that basis, and the fact that the cost of the Documentation Associates' proposal far exceeded that of TDC's, the contracting officer selected TDC for final negotiations.

On September 27, Documentation Associates filed a protest in our office against the contracting officer's decision, on essentially two bases. First, Documentation Associates believes that to properly prepare its proposal it should have been furnished copies of the library procedures manual, the library budget, and certain other information, all of which were available to TDC as the incumbent contractor. Second, Documentation Associates contends that its proposal should not have been rejected on the basis of a high cost proposal without the opportunity to discuss costs, which it alleges it was led to believe would be afforded (the revised proposal submitted by Documentation Associates contained only technical revisions). In addition, Documentation Associates suggests that NASA should have procured the required services by use of either the section 8(a) program of the Small Business Act, 15 U.S.C. § 637(a)(1) (1970), or a small business set-aside.

In regard to NASA's failure to provide the protester with the library budget, procedures manual, and other data, section 20.2(b)(1) of our Bid Protest Procedures, 4 C.F.R. part 20 (1977) (Procedures), provides in pertinent part:

"Protests based upon alleged improprieties in any type of solicitation which are apparent prior to \* \* \* the closing date for receipt of initial proposals shall be filed prior to \* \* \* the closing date for receipt of initial proposals. \* \* \*"

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The record shows that Documentation Associates requested the subject items during the preparation of its initial proposal, but its requests were either denied or not answered. However, it did not protest the RFP's failure to include the items prior to June 27, when proposals were due. Accordingly, the protest on that issue is untimely under section 20.2(b)(1) of our Procedures, and will not be considered on its merits. The same considerations apply to the protest against the use of an unrestricted solicitation.

Alternatively, even if we were to consider Documentation Associates' requests for material as protests to the contracting activity on that issue, section 20.2(a) of our Procedures requires that for purposes of our review any subsequent protest to the General Accounting Office must be filed within 10 working days of "formal notification of or actual or constructive knowledge of initial adverse agency action." The receipt of proposals on June 27 without responding to Documentation Associates' requests must be considered adverse agency action within the meaning of that section. See Kinetic Systems, Inc., B-189146, July 1, 1977, 77-2 CPD 5. Accordingly, the protest on that issue to our Office, filed more than 10 working days thereafter, cannot be considered on that basis either.

Concerning whether cost discussions should have been conducted with Documentation Associates, NASA states that Documentation Associates' costs were not discussed for essentially two reasons. One reason was the agency's belief that there was no potential for a significant cost reduction in Documentation Associates' proposal. The source selection official (SSO) states:

"\* \* \* The initial 'competitive range' determination could have excluded them from consideration because [of the cost differential between Documentation Associates' proposal and TDC's] \* \* \*. However, in the

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interest of providing them maximum opportunity to compete, and Ames obtaining maximum competition, they were included in the initial 'competitive range.' Even assuming a [substantial] negotiated reduction \* \* \* their cost proposal would still be non-competitive.

\* \* \* To expedite the negotiation process, the RFP requested contractors to submit a copy of their proposal to the cognizant DCASR/Audit Agency since \* \* \* a Field Audit per NASA Procurement Regulations [was required]. Admittedly, we probably should have cancelled the audit request on Documentation Associates, because their cost proposal was non-competitive. \* \* \* They simply were non-competitive in the cost area. \* \* \*

Secondly, NASA concluded that Documentation Associates' "cost proposal was clear and that the supporting documentation was sufficient to establish its validity. There appeared to be no unexplained areas requiring exploration." NASA believes that cost discussions were therefore not required pursuant to NASA PRD 70-15 section IIIe(2), which exempts from the discussion requirement an item that is clear in meaning, and for which there is enough information to assess its validity but reflects "a weakness which is inherent in a proposer's management, engineering, or scientific judgment, or is the result of its own lack of competence or inventiveness." The directive specifically requires that such weaknesses not be pointed out to firms in the competitive range. In this connection, NASA also points out, citing 52 Comp. Gen. 161 (1972), that we have held that there is no requirement that an offeror be advised that its price is too high.

Concerning NASA's first reason, under NASA PRD 70-15 sections III(d) and (e), "discussions" are held with offerors in the "competitive range" after an initial evaluation of proposals. NASA PRD 70-15 section III(d)

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provides that the "competitive range" should include proposals "which have a reasonable chance of being selected for final award." See also NASA Procurement Regulation § 3.805-1(a) (1975 ed.). Competitive range determinations necessarily involve the exercise of a considerable degree of discretion by procurement officials and will not, therefore, be questioned by our Office unless they are without a reasonable basis. See Systems Consultants, Inc., B-187745, August 29, 1977, 77-2 CPD 153; Contract Support Company, B-184845, March 18, 1976, 76-1 CPD 184.

However, the SSO's statements in NASA's report as set out above indicate that Documentation Associates' cost proposal was so high that the firm was "non-competitive," i.e., would almost certainly never have been awarded the contract under the RFP. In this connection, our Office will not object to a contracting agency's determination that costs are unrealistic unless there is no rational basis therefor. See Analysis and Computer Systems, Inc., B-188787, January 31, 1978; Dynalectron Corporation, Lockheed Electronics Company, Inc., 54 Comp. Gen. 552 (1975), 75-1 CPD 17. The SSO states that although the proposal "probably" should have been rejected after its initial evaluation, it was instead included in the competitive range to maximize competition. We do not see how competition is maximized by including a "non-competitive" offer in the competitive range. See Sperry Rand Corporation (Univac Division), IBM Corporation, Federal Systems Division, 54 Comp. Gen. 408, 411 (1974), 74-2 CPD 276; 52 Comp. Gen. 870, 873 (1973).

In regard to the above, the Method of Evaluation, Cost Factors, and Weighting and Scoring clauses indicate that cost, although not numerically scored, was an important factor in judging the relative merits of proposals. Further, NASA PRD 70-15 sections III(c) and (d) specifically direct that cost must be considered in determining whether a proposal is in the competitive range; in fact, section III(c) suggests that prior to the initial ranking of proposals, a proposal which has "out-of-line costs, which discussions with the offeror could not reasonably be expected to cure,"

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should not be further evaluated. We have sanctioned the exclusion of a firm from the competitive range in similar circumstances. See Datawest Corporation, B-185060, February 17, 1976, 76-1 CPD 106; RKFM Products Corporation, B-186424, September 15, 1976, 76-2 CPD 247.

Thus, Documentation Associates should not have been included in the competitive range. The protester was not, therefore, prejudiced by the lack of cost discussions. In view thereof, it is not necessary to consider NASA's other reason for not conducting cost discussions with Documentation Associates.

The protest is denied. However, since firms should not be included in the competitive range without a reasonable chance for award, we are bringing the above-discussed matter to the attention of the Administrator of NASA.

*R. F. Koster*  
Deputy Comptroller General  
of the United States